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DUAMASA CONSTRUCTION SDN BHD

v.

MUI CONTINENTAL INSURANCE BHD; HISNIAGA JAYA SDN BHD (PROPOSED INTERVENER)

B

HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[ORIGINATING SUMMONS NO: S2-24-1230-2008]
24 APRIL 2009

C

CIVIL PROCEDURE: *Intervener - Rights and Interest - Whether Proposed Intervener's rights and interests affected by this present action - Whether intervener application filed too late - Final order made and order was signed and perfected by Registrar - Rules of the High Court 1980, O. 15 r. 6*

D

CIVIL PROCEDURE: *Judgments and orders - Order made by court - Whether order dated 24 October 1998 was a regular order - Performance bond issued by the defendant was an on demand bond - Plaintiff's demand sufficiently complied with terms of performance bond - Whether defendant obliged to make payment to plaintiff*

E

The plaintiff appointed the proposed intervener to carry out works in a project known as "Cadangan Membina dan Menyiapkan Maktab Rendah Sains MARA ('MRSM')" in Alor Gajah, Melaka. It was agreed that the proposed intervener was to furnish to the
F plaintiff a performance bond in the sum of RM1,237,500 in favour of the plaintiff. The proposed intervener furnished the performance bond issued by the defendant in favour of the plaintiff. The plaintiff claims that the proposed intervener failed to carry out the works according to the contract. Consequent to notices sent to the
G proposed intervener, the plaintiff made a written demand on the performance bond to the defendant despite objections by the proposed intervener. Further to the plaintiff's demand on the performance bond, the proposed intervener filed Civil Suit No. S2-22-427-2007 (the '427 suit') against the plaintiff and defendant
H herein for an interim injunction to restrain the plaintiff (the 1st defendant in the 427 suit) from making any demand for payment on the performance bond and for the defendant (the 2nd defendant in the 427 suit) to be restrained from making any payment until the determination of the dispute between the proposed intervener and the plaintiff. In the 427 suit the court found the performance
I bond issued by the defendant to be an on demand bond and that

the plaintiff's demand had sufficiently complied with the terms of the performance bond thereby obligating the defendant to make payment to the plaintiff. Consequently the proposed intervener's application for the interim injunction was dismissed whereupon the proposed intervener filed the Appeal No. W-02-550-2008 against that decision.

Subsequently the plaintiff demanded payment under the performance bond from the defendant. The defendant's solicitors refused and made it clear to the plaintiff's solicitors that the defendant had no intention of paying out the monies under the performance bond as appeal No. W-02-550-2008 relating to the 427 suit was pending. The proposed intervener's solicitors had also written to the defendant's solicitors giving notice to the defendant's solicitors that the proposed intervener disagreed and objected to any payment or attempt to pay on the performance bond to the plaintiff and further that they would hold the defendant liable for all loss and damage that the proposed intervener may suffer in the event the defendant makes payment to the plaintiff.

Pursuant to the defendant's refusal to pay, the plaintiff filed the present action for an order that the defendant pay to the plaintiff the sum of RM1,237,500 on the performance bond. The plaintiff's application was allowed with costs on 24 October 1998 ('said order'). The defendant's solicitors then notified the proposed intervener's solicitors of the said order. As a result, the proposed intervener filed an application to intervene and be made a party and to set aside the said order or to stay the execution of the order (encl. 10). Upon application by the proposed intervener, an interim stay of execution of the said order dated 24 October 2008 was granted pending the disposal of this application.

The proposed intervener submitted that it should be allowed to intervene as its rights and interests were affected by this action. The plaintiff however argued that the application to intervene was filed too late *ie*, on 12 December 2008 whereas judgment in the present case was pronounced on 24 October 2008. On the proposed intervener's application to set aside the order dated 24 October 2008 it was submitted that the proposed intervener was not a party to these proceedings and thus not the appropriate party to make such application. Further the plaintiff argued that it ought not to be deprived of the fruits of their litigation. The plaintiff's counsel also submitted that the proposed intervener had not shown special

A circumstances in order to obtain a stay of execution and that the plaintiff's statement of financial affairs as at 31 December 2007 filed with the Companies Commission of Malaysia did not prove that the plaintiff would be unable to repay the performance bond.

B **Held (dismissing the proposed intervener's application with costs):**

(1) The proposed intervener's application was filed too late. The proceeding in this action had been concluded. A final order had been made on 24 October 2008 and the order was signed by
C the Senior Assistant Registrar and perfected on 25 October 2008, well before the proposed intervener filed his application on 12 December 2008. For this reason the proposed intervener's application ought to be dismissed with costs. *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* (foll); *Arab Malaysian*
D *Bank Bhd v. Jamaludin Dato Mohd Jarjis* (dist). (para 19)

(2) The said order dated 24 October 2008 was a regular order made after hearing both parties. Whilst it is true that in the 427 suit the court found that there were issues to be tried, the court had also found that the performance bond was an on demand bond
E and the demand made by the plaintiff on the performance bond was proper. Therefore the defendant was obliged to make payment. The plaintiff's alleged or perceived impecuniosities was not a ground to restrain payment on the performance bond. The court noted that the proposed intervener omitted to
F exercise their right to apply for an *Erinford* injunction upon the dismissal of their interim injunction application in the 427 suit. The proposed intervener ought to have exhausted their remedies in the 427 suit. (para 19)

G **Case(s) referred to:**

Arab Malaysian Bank Bhd v. Dr Jamaludin Dato Mohd Jarjis [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 SC ***(foll)***

Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 HC ***(refd)***

Gai Hin Refrigeration Sdn Bhd v. Kamanis Holdings Sdn Bhd [2004] 4 CLJ 232 CA ***(refd)***
H

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ 121 FC ***(foll)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

TAC Construction & Trading v. Bennes Engineering Bhd (No 2) [1999] 2 CLJ
I *518 HC* ***(refd)***

Tat Choi Yu v. Syarikat Tingan Lumber Sdn Bhd [1998] 4 CLJ 293 CA ***(refd)***
Wu Shu Chen (Sole Executrix of the of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 6(2), O. 92 r. 4

For the plaintiff - Azman Thaiyub Khan; M/s Thaiyub Khan Othuman & Co
For the proposed intervener - Chuah Thiam Ming; M/s Azri Chuah & Yap

Reported by Susheila Sreedharan

JUDGMENT

Aziah Ali J:

[1] By way of encl. 10 Hisniaga Jaya Sdn Bhd (the 'proposed intervener') sought leave to intervene in the present suit and to be made a party. I dismissed the proposed intervener's application. This is the proposed intervener's appeal against my decision.

[2] The proposed intervener sought the following reliefs pursuant to O. 15 r. 6(2) and O. 92 r. 4 of the Rules of the High Court 1980 ('the RHC'):

(1) Hisniaga Jaya Sdn Bhd dibenarkan mencelah dalam guaman/tindakan ini dan dijadikan suatu pihak di dalam guaman/tindakan ini;

(2) (a) Perintah bertarikh 24.10.2008 yang diperolehi Plaintif di dalam tindakan ini diketepikan secara keseluruhannya; ataupun

(b) perlaksanaan Perintah bertarikh 24.10.2008 yang diperolehi Plaintif di dalam tindakan ini digantungkan sehingga rayuan Hisniaga Jaya Sdn Bhd kepada Mahkamah Rayuan Malaysia di bawah guaman Mahkamah Rayuan Malaysia, Rayuan Sivil No: W-02-550-2008 diperbicarakan dan diputuskan dengan sepenuhnya;

(3) kos permohonan ini adalah kos di dalam kausa; dan

(4) sebarang perintah dan/ataupun relif yang difikirkan adil dan suaimanfaat oleh Mahkamah Yang Mulia ini.

[3] The proposed intervener's application was filed consequent to a letter dated 25 November 2008 from the defendant's solicitors to the proposed intervener's solicitors notifying the proposed

A intervener's solicitors that on 24 October 2008 the plaintiff had obtained an order that the defendant *inter alia* pay to the plaintiff the sum of RM1,237,500 on the performance bond issued by the defendant in favour of the plaintiff (the 'order'). For the purpose of this judgment it is necessary to refer to the background of this
B action by the plaintiff against the defendant.

Background

[4] The plaintiff had appointed the proposed intervener to carry out works in a project known as "Cadangan Membina dan
C Menyiapkan Maktab Rendah Sains MARA (MRSM)" in Alor Gajah, Melaka. It was agreed between the plaintiff and the proposed intervener that the proposed intervener was to furnish to the plaintiff' a performance bond in the sum of RM1,237,500 in favour of the plaintiff. The proposed intervener furnished the performance
D bond issued by the defendant in favour of the plaintiff. The plaintiff claims that the proposed intervener had failed to carry out the works according to the contract. Consequent to notices sent to the proposed intervener, the plaintiff made a written demand on the performance bond to the defendant despite objections by the
E proposed intervener.

[5] Pursuant to the plaintiff's action in making a demand on the performance bond, the proposed intervener filed civil suit No. S2-22-427-2007 (the '427 suit') against the plaintiff and defendant herein for an interim injunction to restrain the plaintiff (the 1st
F defendant in the 427 Suit) from making any demand for payment: on the performance bond and for the defendant (the 2nd defendant in the 427 Suit) to be restrained from making any payment until the determination of the dispute between the proposed intervener and the plaintiff. In the 427 suit I found that the performance bond
G issued by the defendant to be an on demand bond and that the plaintiff's demand has sufficiently complied with the terms of the performance bond. It was a proper demand. Therefore I found that the defendant is obliged to make payment to the plaintiff. Consequently I dismissed the proposed intervener's application for
H the interim injunction where upon the proposed intervener filed the appeal No. W-02-550-2008 against this decision.

[6] Subsequently the plaintiff demanded payment under the performance bond from the defendant. The defendant's solicitors refused and made it clear to the plaintiff's solicitors that the
I defendant has no intention of paying out the monies under the performance bond for the reason that the appeal No. W-02-550-2008

relating to the 427 suit is pending and there is no finality yet to the appeal. The solicitors for the proposed intervener had also written to the defendant's solicitors giving notice to the defendant's solicitors that the proposed intervener disagree and object to any payment or attempt to pay on the performance bond to the plaintiff. In the same letter the proposed intervener's solicitors also gave notice that they will hold the defendant liable for all loss and damage that the proposed intervener may suffer in the event the defendant makes payment to the plaintiff.

[7] Pursuant to the defendant's refusal to pay, the plaintiff filed this action for an order that the defendant pay to the plaintiff the sum of RM1,237,500 on the performance bond. On 24 October 2008 I allowed the plaintiff's application with costs. The defendant's solicitors then notified the solicitors for the proposed intervener of the said order. The result is the present application encl. 10 by the proposed intervener. Upon application by the proposed intervener, an interim stay of execution of the order dated 24 October 2008 was granted pending the disposal of this application.

Submissions By The Proposed Intervener

[8] On the application to intervene, it is submitted that in the 427 suit, the plaintiff who is the 1st defendant there has alleged in its defence and amended counterclaim that the proposed intervener is liable to the plaintiff for costs allegedly incurred in appointing 3rd party contractors to conduct the works, for alleged breach by the proposed intervener and for alleged liquidated damages for delay in the conduct of the works. The proposed intervener has filed a reply and defence to amended counterclaim and the plaintiff then filed a reply to the proposed intervener's reply and defence to counterclaim. The 427 suit is in the process of case management.

[9] The proposed intervener states that notwithstanding the pendency of the proposed intervener's appeal to the Court of Appeal and the trial of the 427 suit, the plaintiff commenced the present action but did not serve any documents on the proposed intervener nor make the proposed intervener a party. The proposed intervener only became aware of the order dated 24 October 2008 upon being notified by the defendant's solicitors. Upon receipt of the letter from the defendant's solicitors, the proposed intervener filed this application to intervene and to set aside the said order or to stay the execution-of the order.

[10] Counsel for the proposed intervener submits that the plaintiff's present action and the plaintiff's demand on the defendant in connection with the performance bond are based on alleged liquidated damages payable to the plaintiff by the proposed intervener for alleged delay in completion of the contract works, breach by the proposed intervener in completing the contract works and alleged monies owing to the proposed intervener for costs of appointing third party contractors. The plaintiff's claim against the defendant in this action is for full payment of the performance bond towards the monies alleged to be payable to the plaintiff. It is submitted that the present action directly affects the proposed intervener's legal rights and claims in the 427 suit. The proposed intervener submits that:

(a) the grounds relied on by the plaintiff in the present suit are identical to the plaintiff's counterclaim against the proposed intervener in the 427 suit;

(b) notwithstanding the court's refusal to grant the proposed intervener's application for an interlocutory injunction against the plaintiff in the 427 suit, the court found there are serious issues to be tried thus rendering the proposed intervener's claim and the plaintiff's counterclaim in the 427 suit to proceed to trial;

(c) the current action commenced by way of originating summons and without naming the proposed intervener as a party will prejudice and cause disadvantage to the proposed intervener's rights in the 427 suit for the following reasons:

(i) it will result in the circumvention of the proposed intervener's rights to challenge the plaintiff's counterclaim in the 427 suit for the alleged monies payable by the proposed intervener to the plaintiff;

(ii) It denies the proposed intervener the right to challenge the plaintiff's counterclaim when there are serious issues to be tried;

(iii) it enables the plaintiff to summarily obtain judgment on the sums allegedly payable to the plaintiff thus rendering the plaintiff's counterclaim unnecessary;

(iv) the order dated 24 October 2008 that the defendant pay the plaintiff on the performance bond renders the proposed intervener to liability for loss incurred by the defendant upon payment of the amount under the performance bond to the plaintiff;

(v) in the 427 suit the plaintiff has yet to prove its counterclaim against the proposed intervener and there is no conclusive decision yet that the proposed intervener is the party liable to the plaintiff for the amount equal to the amount under the performance bond;

(vi) the order dated 24 October 2008 will render the proposed intervener's appeal in the 427 suit against the court's dismissal of the interlocutory injunction application nugatory and useless thus affecting the proposed intervener's legal rights in the appeal.

[11] Therefore it is submitted that the proposed intervener should be allowed to intervene and to be made a party in this action as the proposed intervener's rights and interests are clearly affected by this action. In support the proposed-intervener relies on the case of *Arab Malaysian Bank Bhd v. Jamaludin Dato Mohd Jarjis* [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19.

Submissions By The Plaintiff

[12] Counsel for the plaintiff raised the issue that the application to intervene was filed too late. The application to intervene was filed on 12 December 2008. Judgment in the present case was pronounced on 24 October 2008. It is submitted that the matter has been heard and disposed off and judgment was made on 28 October 2008 in favour of the plaintiff. Counsel submits that the court is therefore *functus officio* (*Tat Choi Yu v. Syarikat Tingan Lumber Sdn Bhd* [1998] 4 CLJ 293; *Gai Hin Refrigeration Sdn Bhd v. Kamanis Holdings Sdn Bhd* [2004] 4 CLJ 232).

[13] On the proposed intervened application to set aside the order dated 24 October 2008 it is submitted that the proposed intervener is not a party to these proceedings. Therefore the proposed intervener is not the appropriate party to make such application. Further counsel submits that the plaintiff ought not to be deprived of the fruits of their litigation (*Wu Shu Chen (Sole Executrix of the of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor* [1996] 2 CLJ 353; [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366; *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380).

[14] Counsel submits that the proposed intervener has not shown special circumstances in order to obtain a stay of execution. The proposed intervener merely repeats the submissions that in the event their appeal in the 427 suit is successful, the plaintiff does not have

A sufficient funds to repay the performance bond. It is submitted that the plaintiff's statement of financial affairs as at 31 December 2007 filed by the plaintiff with the Companies Commission of Malaysia that the proposed intervener relies on to show that the plaintiff does not have the financial capacity to pay does not prove that the B plaintiff will be unable to repay the performance bond (*TAC Construction & Trading v. Bennes Engineering Bhd (No. 2)* [1999] 2 CLJ 518).

[15] Counsel submits that in the 427 suit the court had refused the proposed intervener's application for an interim injunction to C prohibit the plaintiff from claiming from the defendant on the performance bond. The plaintiff then demanded payment from the defendant. The defendant refused to pay and the court has entered judgment against the defendant. The defendant's application for an *Erinford* injunction or a stay of proceedings has been dismissed. It D is submitted that the proposed intervener's action is to stop the plaintiff from realizing the fruits of its litigation. Counsel submits that the court ought not to allow the proposed intervener's application.

E **[16]** On the issue raised by the plaintiff's counsel that this application was filed too late, counsel for the proposed intervener submits that the application was filed on 12 December 2008 before the order was perfected, and therefore the issue of being too late does not arise.

F **Decision**

[17] In my opinion it is appropriate to deal firstly with the issue raised by counsel for the plaintiff, that is, whether this application to intervene was filed too late. A perusal of the court file shows that the order dated 28 October 2008 (encl. 8) which was filed on G 20 November 2008 was signed and perfected by the Senior Assistant Registrar on 25 November 2008. The proposed intervened application was filed on 12 December 2008.

[18] In *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* H [2008] 2 CLJ 121, Abdul Hamid Mohammad CJ in delivering the judgment of the Federal Court said *inter alia* as follows:

> In *Nile Beauty Industries Sdn, Bhd. & Anor. v. Bayer (M) Sdn. Bhd.* [2000] 6 CLJ 151, Bayer, an unsecured creditor, who was bound by the scheme of arrangement and compromise approved by an order of I court, applied to be added as a party to the proceedings before the court and also to declare. *Inter alia*, the order a nullity. The application was also made under O. 15 r. 6(2) of the RHC 1980. Jeffrey Tan J, *inter alia* held:

(3) Although O. 15 r. 6(2) states that such an application could be made at any stage of the proceedings, its scope should be limited to an application made before final judgment had been entered and not after because the proceedings would then have come to an end. Thus the would be intervener who will be directly affected, either legally or financially, by any order which may be made in the action, must intervene before that order is perfected and whilst the court is still not *functus officio*. All proceedings came to an end upon the approval of the scheme of arrangement and compromise on 14 May 1999, thus the court no longer has any jurisdiction to make any order under O. 15 r. 6(2) (see pp. 318H-319B, E. I).

His Lordship said further:

Thus, we see that our courts have been very consistent regarding the scope of the application of this rule. This is very sensible as the words "At any stage of the proceedings ..." necessarily mean that there is a proceeding pending. Once the judgment is entered, the proceeding has come to an end. Furthermore, O. 15 is concerned with the very early stage of a proceeding, to have all the necessary parties in before the trial begins. Thus, r. 8 provides that, when the order under r. 6 has been made, the plaintiff must accordingly amend the writ and serve the amended writ on the new defendant and upon service the new defendant is given the right to enter an appearance, All these happen before the trial.

His Lordship also referred to the *Arab Malaysian Bank Bhd* case *(supra)* and said as follows:

All that I need to say about *Arab Malaysian (supra)* is that in that case the application to intervene was made to set aside a judgment obtained in default of appearance. There is a specific provision for that in O. 13 r. 8 of the RHC 1980, However, the Supreme Court did not refer to that provision but decided on the provision of O. 15 r. 6(2) of the RHC 1980, without saying anything regarding at what stage intervention may be allowed. Again, while the principle regarding the exercise of the discretion to allow to intervene, following *Pegang Mining (supra)*, is valid, Arab Malaysian is no authority regarding at what stage intervention under O. 15 r. 6 of the RHC 1980 may be allowed.

...

Considering all these authorities, my conclusion is that an application to intervene under O. 15 r. 6(2) of the RHC 1980 must be before judgment

A To set aside an order or judgment, there must be a provision in the Rules that can be relied on for the purpose. This is provided for in O. 42 r. 13 of the RHC 1980:

13. Setting aside or varying judgments and orders (O. 42 r. 13)

B Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

C Examples of such provisions are O. 13 r. 8, O. 14 r. 11, O. 70 r. 18(6) and 20(9) and O. 81 r. 7 of the RHC 1980. In other cases, setting aside may only be done by a fresh action - see *Hock Hua Bank Bhd. v. Sahari bin Murid* [1980] 1 LNS 92.

D ... where a non-party tries to intervene in the proceedings, he must necessarily do so under O. 15 r. 6 of the RHC 1980.

... In my view, it would be clearer to everybody's mind if, in an application to intervene by a non-party, the focus is on O. 15 r. 6 of the RHC 1980. On the other hand, where the application to E set aside an order is made by an existing party, then the court considers whether the judge is *functus officio*.

In an application to intervene by a non-party in a proceeding all that a judge has to do is, first, to determine whether there is a proceeding still pending. *Where a final order, in this case the order* F *for sale, has been made and perfected clearly the proceeding has concluded. It is then too late to intervene under O. 15 r. 6(2)(b)(ii) of the RHC 1980.*

(emphasis added)

G **[19]** Applying what has been said in the abovementioned case to the facts in the present action, I agree with counsel for the plaintiff that the proposed intervener's application was filed too late. The proceeding in this action has been concluded. A final order has been made on 24 October 2008 and the order was signed by the Senior Assistant Registrar and perfected on 25 November 2008, well H before the proposed intervener filed his application on 12 December 2008. For this reason the proposed intervened application ought to be dismissed with costs. It is therefore unnecessary to deal with the proposed intervened other prayers in encl. 10 seeking to set aside or to stay the execution of the order dated 24 October 2008. I However for completeness it is my view that the order dated 24 October 2008 is a regular order made after hearing both parties.

Whilst it is true that in the 427 suit I had found that there were Issues to be tried, I had also found that the performance bond is an on demand bond and the demand made by the plaintiff on the performance bond is proper. Therefore the defendant is obliged to make payment. The plaintiff's alleged or perceived impecuniosities is not a ground to restrain payment on the performance bond. Further during the hearing of this application I had also raised with counsel for the proposed intervener their omission to exercise their right to apply for an *Erinford* injunction upon the dismissal of their interim injunction application in the 427 suit. I am of the view that the proposed intervener ought to have exhausted their remedies in the 427 suit.

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